The Province of Alberta

IN THE MATTER OF "THE NATURAL GAS UTILITIES ACT"

—and—

IN THE MATTER OF an Enquiry into Scheme to be adopted for Gathering, Processing and Transmission of Natural Gas in Turner Valley

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G. M. BLACKSTOCK, Esq., K.C., *Chairman*

Dr. E. H. BOOMER, F.C.I.C., *Commissioner*

Session:

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VOLUME 2.

THE NATURAL GAS UTILITIES BOARD

Hearing at the Court House, Calgary, before G. M. Blackstock, Esq., K.C., Chairman, and A. G. Bailey, Esq., Commissioner, on the 5th day of March, A.D. 1947.

PRESENT:

C. S. Blanchard, Esq., K.C.

G. H. Steer, Esq., K.C.

E. J. Chambers, Esq.,K.C.,

R. H. C. Harrison, Esq.,

G. W. Auxier, Esq., -and-

D. P. McDonald, Esq.,

THE CHAIRMAN: In the letters which I wrote you which resulted in this meeting today, I outlined somewhat briefly the problem facing the Board. It arises out of the Board's decision respecting the allocation of costs as between Madison and Royalite, and as between British American Oil Company and B. A. Utilities, although B. A. Utilities did not specifically raise the point. You will remember that I released a draft of my decision to Counsel in order that the decision might be revised in matters of detail. With that decision there were schedules which had been prepared by Mr. Hamilton, and in preparing those schedules he applied to the years 1945 and 1946 the cost allocation laid down in the decision. In the meantime, Madison had been charging Royalite on an entirely different basis, which I will deal with shortly.

On the 23rd of January, when we met to consider the draft decision, Mr.Chambers, on behalf of Madison, raised a point of discrimination.

MR.CHAMBERS: If I may interject, Mr. Chairman. I intended to make my objection primarily on behalf of Royalite.

THE CHAIRMAN: All right. I think it matters not which way it is considered. Madison obviously is looking for, or rather asking to be recouped in some fashion or another for the difference between the amount allocated by the Board and the amount actually charged. I assume that if Royalite is not to pay that amount, and if the Madison desires repayment from someone, then the public is the only source from which that money can be obtained.

And Mr. Chambers pointed out that the rates respecting gas purchases were made effective as from 1947, that the rate for gas marketed became applicable as from 1947, but that the carrying charge to Royalite was made retroactive to 1945.

Now I want first to remind you of the evidence which was given by Mr. Latham at the Hearing on the 22nd of May, 1944, when he said:

> "It is also suggested that the total costs as estimated from the above mentioned factors be apportioned in ratio to the respective revenues from gas sales and natural gasoline sales. The total amount to be assumed by Royalite Oil Company, Limited, would then be converted into a percentage of natural gasoline sales, which percentage would be paid by Royalite to Madison monthly."

Mr. Latham also said:

> "As previously mentioned, it has been agreed between

"Madison Natural Gas Company Limited and Royalite Oil Company, Limited, that the various factors mentioned herein are all those which should properly enter into the costs, and will provide an accurate basis for the division of such costs. As to the proposal that the costs be divided in proportion to respective revenues, this method is one of the generally accepted methods of allocation, and apparently there is no method more equitable."

And that evidence was followed by the evidence of Mr. Kirkpatrick on April 17th, 1945, at Volume 24, in answer to Mr.Fenerty,

"Q And in these statements was there any division of operating costs or were they founded on any division of operating costs?

A Operating costs in what respect, sir?

Q Handling the gathering lines for instance?

A Oh yes, certainly.

Q And do you remember how they were divided?

A I certainly do. They were divided on a basis of gross realization from the two plants which were affected by them."

Without reading the rest, Mr. Kirkpatrick went on to say that at one time he considered that was a proper method of allocation. At the time he was giving evidence he did not consider that was a proper method, and one can read into it that he thought the division of the two companies created a new situation. He was then asked to specify portions which would result by the application of the sales realization method, and he said it was 40-60,

"Q Which was forty?

A Sixty I think was the natural residue gas, that is my recollection.

Q And forty was the gasoline?

A The gasoline operation."

On that evidence I base my decision. After the meeting on the 23rd of January, Madison furnished a statement which showed that for the years 1945 and 1946 they would be short in revenue in the sum of $260,161.00. That amount represents the Board's cost allocation of $312,209.00 less the charges made by the Royalite on the 5% basis of $52,048.00, resulting in a deficit of $260,161.00.

You will remember that in Madison's original submission it was suggested that Royalite's contribution towards gathering and compression costs should be on the basis of 5% of the gross revenue from natural gasoline. I asked Madison for some further statements and received them. If the volumetric method of cost allocation should have been adopted, then the deficit would be $186,024.00 arising in this way, the Board's allocation of $312,209.00. And if Madison had charged Royalite on the volumetric basis, the payment would have been $126,185.00, resulting in a deficit of $186,024,00.

Now I want to go a little further. The Board prepared, or Mr. Hamilton prepared for the Board, a revenue budget for the years 1945 to 1948. Over the four year period that statement would show a surplus to Madison of $133,063.00 over and above its allowed rate of 7% per annum. Now if that surplus forecast by the Board is applied to the figures which I previously quoted, the surplus will disappear, and if Royalite is charged on the 5% basis instead of a surplus of a hundred and thirty-three

thousand odd dollars and Madison failed to earn its rate of return of $17,198,00, and if the volumetric basis is used, Madison would have failed to make its rate of return of $52,961.00. And what is equally important, the cushion which the Board provided, and which should he provided, disappears altogether, and the question, as I see it today, is should Madison be recouped for any deficiency arising from the Board's cost allocation, and the charges made by them to Royalite, and if so, who should pay, Royalite or the public, or must the Madison suffer its own loss?

I think,Mr. Chambers, that states it as fairly as I can, and I would now like you to elaborate on your argument, deal with it at length so that Counsel for opposing interests may have an opportunity of replying.

MR. CHAMBERS: Well the position that I take, Sir, on behalf of Royalite, it was primarily on a position so taken on Royalite's behalf at the meeting of Counsel that the Board on the 23rd of January, is as quoted in the letter, calling us together. The increased rates or revenue to be charged and received by Madison are to be made effective, as you have stated, from the first of 1947 as regards the purchases of the scrubbed gas, and the increased price to be charged for and paid to producers of raw gas is made effective as from the first of 1947. In other words, the conclusions as to rates and charges and to revenues which the Board has come to as a result of a prolonged hearing are to be put into effect and the judgment is to speak as from the time when the conclusion was arrived at, namely, the first of January, 1947. Whereas, on the other hand, the increased charge to Royalite, or the basis which the Board has determined upon following the hearing, and that conclusion or determination the Board has arrived at in its judgment, is, as the draft judgment

was shown to us, proposed to be made retroactive for two years.

Now I submit in the first place that the fact that Royalite is a controlling shareholder or the sole shareholder of Madison, which is the utility company, has no proper bearing on the matter whatsoever. The position would, I say, be exactly the same if Madison had not been formed. The crux of the situation, as I see, it is whether like treatment is to be accorded to one class of customer, that is, the absorption plant owner, whether he is a company or individual or whether he owns other property or not, is to be the same as that accorded to other classes of customers, that is, the dry gas market, whether they are individuals or whether they are large companies or small companies. And I also suggest and urge that the proprietors or industrialists, whether large or small, are entitled to the benefit of the same treatment and to the application of the same fundamental principles, and I submit that that is what is involved here, the fundamental principles, as every other customer of the regulated body.

Now without taking the time to go into the cases again, I am just, for the purposes of the record, referring to certain places on the existing transcript where I refer to the following well known decisions, which are to be found in the record of my argument to the Board, in Volume 82, pages 6562 to 6565, and they were decisions of the Supreme Court of Canada. There were three I referred to. One was The Attorney General of Canada v. The City of Toronto. Then there was The City of Hamilton v. The Hamilton Distillery. The other was Jonas v. Gilbert. And you will recall that in the City of Toronto case the statute gave the City Council or the body, the municipal body, wide power to regulate rates for water, I think it was, the City to fix them in their discretion. And that body, in

pursuance to that authority, proceeded to set up rates and allow discounts generally, but made an exception that those discounts were not to be accorded to non-taxpaying bodies, aiming at the Dominion Government that owned a large amount of property in the City of Toronto, and the Supreme Court of Canada held that was discrimination, and it was invalid, and the same principle is enunciated, and I have referred to it in my argument before in the case of Western Union Telegraph Company v. McCall Publishing Company, before the United States Supreme Court, and other cases which are cited in Volume 83, page 6761.

And then I submit that this Act itself, Section 74, provides specifically with regard to the gathering system, that there shall not be discrimination as between or as against parties who are served by that system, and I referred to that in Volume 82, Pages 6565 and 6566.

Now I submit that the Board, which is the regular tribunal set up, cannot in the absence of unambiguous language in the Statute authorizing it to discriminate. I say in the absence of that the Board can no more by its Order than the utility itself by its schedules or its practices, effect discrimination.

I submit first of all that that is simplified in the Hamilton case, which I referred to, and also in the City of Toronto case, and there is also the Texas case, the case of the Supreme Court of Texas which I referred to in my argument at Volume 83, page 6762. I think I have that case handy, Sir. It is the Railroad Commission v. Houston Chamber of Commerce, (1935). I have not the report. It is in 78 Southwestern Reports, 2nd, 591. It says this:

" The legislature, in creating the commission and vesting it with power to make and regulate rates, did not intend to confer upon it authority to make discriminations for the purpose of offsetting natural and other advantages possessed by localities and individuals."

I submit that illustrates the principle that I have in mind.

THE CHAIRMAN: That is discrimination as between the same type of customer though.

MR. CHAMBERS: Oh yes, oh yes.

THE CHAIRMAN: Getting the same service?

MR.CHAMBERS: What I suggest is this, that the discrimination I am talking about - I do not use that in the sense that any change or any difference in rates is discrimination. For instance, a rate charged to somebody with a constant load factor may be one thing; a rate charged to another party with a fluctuating load factor may be considerably higher. I do not suggest that that is discrimination for a moment.

THE CHAIRMAN: Well it is discrimination but it is not unjust.

MR.CHAMBERS: Well yes, that is right, Sir. I do not want to get back to the principle of 40-60. That is something that is not open to me to deal with, but what I say, that any differential in rates that is based on the impact of the cost of the utility is not discrimination nor undue discrimination, and that when the cases talk about discrimination that Boards cannot make, that utilities cannot make, it is discrimination in the sense that there is no differential in cost or

bases of logic and reason behind it.

Now I submit,Sir, that in this case that the discrimination consists primarily in making one set of charges retroactive and the other not. Now I suggest, aside from the question of discrimination itself, that there is no power in the Statute to make any rate retroactive.

THE CHAIRMAN: On that point, Mr. Chambers, as long as the Board had not fixed rates, and you, as the proprietor of a public utility in the interim period yourself had the right to fix rates, didn't you?

MR.CHAMBERS: Yes.

THE CHAIRMAN: And the rate that you fixed must be a just and equitable rate?

MR. CHAMBERS: Well, I would say this, I do not think that the Hearing - that we could fix rates, change them without coming to the Board.

THE CHAIRMAN: Ah, but you did.

MR. CHAMBERS: Now what we did, as we all know, that in the early stages we were all groping, nobody had formulated definite ideas. There was an exchange of letters, which are Exhibit 70, that are on the record between these two companies, of February 3rd, 1944, and February 7th, 1944, which sets forth the basis on which they were to operate until the matter had been disposed of before the Hearing, and that dealt with the price to be paid to the well owner too, that they continue the two sets and it would be this 25% of the gasoline realization ordered by Royalite to Madison, and Madison would keep the 5% of it as its gathering charge and pay the 20% to the well owners, and the two sets were to continue. Now that was entered into in February, 1944.

THE CHAIRMAN: Before the Act was passed?

MR.CHAMBERS: No, no. Yes, that is right.

THE CHAIRMAN: The Act was passed in March, 1944.

MR. CHAMBERS: The Act was passed in March 1944.

THE CHAIRMAN: The 24th, wasn't it?

MR. CHAMBERS: In May of 1944. There was a hearing called to discuss the proposed engineering power and supply, and I submit, Sir, in passing, that that was not the Hearing that you are right now writing your judgment on, and that that was a different matter altogether.

THE CHAIRMAN: The evidence is there though, Mr. Chambers, tendered by your own clients.

MR. CHAMBERS: Certainly. I submit, and I do not intend to take it back, or it would not be any good if I attempted to, that that was set surely, but as I said before, we were all thinking out loud. But the fact remains that that arrangement was made, it was placed before the Board in evidence in April of 1945, in this main Hearing. Now it is true that that rate - probably everybody took it for granted that that rate would not persist after the Board's judgment was known, but I think it was equally true that we all took it for granted, and I think even my friend, Mr.Steer, that the $7\frac{3}{4}$ rate, whatever it was, was not adequate for the new set-up. I do not suggest there is any criticism on him because he did not apply to have it increased at that time.

THE CHAIRMAN: What would the position be if Madison said to Royalite, "You are my parent company, I am going to be very good to you, until the Board fixes a rate you are going to get your service for nothing?"

MR.CHAMBERS: I submit that that is not what we did, and I do not have to meet that.

THE CHAIRMAN: What would be the position if you had done though?

MR. CHAMBERS: I would say then, with the Hearing on, the Board would probably have made an Order.

THE CHAIRMAN: Where do you draw a line between nothing and $300,000.00?

MR. CHAMBERS: I do not know, sir.

THE CHAIRMAN: Isn't this the case, Mr. Chambers, that your client before the Board advocated first of all 5%, then they advocated sales realization, and then finally the volumetric method. The most favourable to Royalite is the 5%.

MR.CHAMBERS: Yes. The 5% is there, or as my recollection is, was put in at the first Hearing when we were concerned primarily with the engineering set-up, and there is no doubt about it that our people had that in mind at the time. Now, frankly, for what it is worth, I think that I had something to do with saying that that basis was not proper, aside from the 5%, and I take it primarily on this ground, I say that no rate that is to be dependent upon a price of a product over which the Board has no control, has the effect of making the charges beyond the Board's control and it is not sound from a utility basis. Now rightly or wrongly, that was one of the reasons, or the main reason why we abandoned that.

THE CHAIRMAN: Well let us for the moment consider it. Your own witness says that the sales realization is the only equitable method, that the application of that resulted in cost allocation for two years of $312,000.00. Isn't it obvious on its face that $52,000.00 for two years is unjustly discriminatory or unduly differential, it doesn't matter which way we take it?

MR. CHAMBERS: By the same token, Sir, I say that the 7¾¢ that we were charging during these two years, was totally inadequate. I am not attempting on this occasion, it is not open to me to argue as to the propriety or merits or demerits of the 40-60 or any other. I say the discrimination of which I am complaining at the moment is that the rateswhich the Board thinks should be charged for the future are in one case being made retroactive as against one customer for two years, and the rates as against the other customers are not being made retroactive at all. Now I do not think there is anything I can usefully add to what I have said. I say to make it retroactive, when it is not being made retroactive as against the other, is discriminatory, and secondly, I say the Board has not the power or authority under the statute, that it is precluded under the statute from making any rate retroactive.

THE CHAIRMAN: Mr. Harrison?

MR.HARRISON: Mr. Chairman, we do not propose offering any argument on this point, but we do take the stand that whatever decision you make, having regard to the Royalite situation, it should be applicable to our absorption plant.

There is one thing I would like to add a word to now. At some of the Hearings, which were informal and of which there was no record kept, we mentioned that our costs of operation of the utilities plant had increased On the 25th of January, Madison submitted some figures showing theirs, and I do think that in any computation the Board makes in attempting to arrive at an over-all schedule, some cushion should be made for actual cost increases over the last few months, unanticipated ones.

You do not wish to hear anything

on the question of legal costs at this time, that is to be brought up later?

THE CHAIRMAN: No, I want to discuss that with you and Mr. Chambers after, because it only affects your two companies.

MR.HARRISON: Quite so.

THE CHAIRMAN: Mr Steer?

MR. STEER: Mr. Chairman, as I understand my learned friend's case, he says that there has been discrimination and retroactivity about the proposed Order. Now I can quite understand a suggestion of discrimination if what is in question is rates that are to be charged o customers for a commodity or a service, other things being equal, of course The rates under those circumstances have got to be equal and non-discriminatory. But I ask the question whether there is any discrimination with respect to rates because, as I understand what the Board has done. it has determined the ratio upon which costs are to be fairly divided between two aspects of one business. It is said that the costs of gathering and compression, as I understand it, are to be divided as to 40% to the gasoline end of the business, and as to 60% to the gas end of that business.

Now, as the Chairman has pointed out, Mr. Latham gave his evidence in May of 1944, and subsequent to that time the agenda for this Hearing was drawn up in which I find as Number 9, "The determination of the cost of gathering and transmitting residue gas", and Number 10 "The cost of delivering wet gas to the natural gasoline plant."

MR. CHAMBERS: That was after Mr. Latham gave his evidence.

MR. STEER: That was after Mr. Latham gave his evidence. That is, the agenda which initiated this Hearing in about January, of 1945, if my recollection serves me right.

I also call the Board's attention to Order No.8 of the Board, which approved of the transfer by Royalite to its wholly owned subsidiary, Madison, as indicated in the evidence, of the gas end of Royalite's business, and the Board was very careful to see that its approval given to that severance did not in any way affect its jurisdiction to control the whole situation thereafter:

> "Provided always that the approval hereby given shall not be deemed as extending to or including the approval of the consideration passing between the parties to the said agreement as set forth therein, nor shall the approval hereby given bind, affect, or prejudice the Board in any determination by it of the rate base to be fixed for the Madison Natural Gas Company Limited, or of the rate of return to be allowed thereon or in its determination of any or either rate which the Board has power to fix and determine under the provisions of The Natural Gas Utilities Act, or to bind, affect or prejudice the Board in the exercise of any jurisdiction which it may have under the provisions of the said Act other than its jurisdiction under Section 52(1) (g) thereof."

The effect of that Order, Sir, in my submission, is that you are free to examine the situation as though both these operations were still being conducted by the Royalite Company. My learned friend, I think, has already stated that. Now then, if you were examining it from that point of view, but before I go into that aspect of it there is another point which I would like to cover before I forget it, and that is to call your attention to Section 52(a) of this Natural Gas Utilities Act. Madison is the proprietor of a public utility.

"No proprietor of a public utility shall make, impose,".... and it was a proprietor of a public utility at the time this 5% deal was made, perhaps I should not say that, it did not become the proprietor of a public utility until after the deal was made but it continued that deal after it became a public utility.

> "No proprietor of a public utility shall make, impose, or exact any unjust or unreasonable, unjustly discriminatory or unduly preferential individual or joint rate, commutation rate, mileage or other special rate, charge or schedule for any product or service supplied or rendered by it within this Province."

If 5% of the selling price of the gasoline product does not repay a fair return to Madison for the services rendered Royalite in carrying that wet gas to Royalite's plant, then the deficiency is a discriminatory rate imposed against the consumers of gas who have to bear that deficiency, and from that point of view the Madison Company in making that contract, and assuming, as the evidence discloses, that a 40-60 division of those costs is fair and equitable, then the Madison Company could not make that contract, it is in breach of that Section 52.

But then I was going to examine the situation from the point of view of Madison and Royalite being an integrated undertaking, and the simplest way of doing that, in my submission, is to suppose the situation that the Orders of the Board were given to the Royalite Company for the consideration of these facilities. Now what would the powers of the Board be if instead of giving/direction to Madison, it had been to Royalite? Surely the Board could under those circumstances examine it, say evidence was put before it for the purpose of determining the proper proportion of charges to be made against the gas end of the business as against the gasoline end of the business. And in dealing with those things, we are not dealing with rates at all, in my submission. The question of discrimination cannot enter this case. What we are dealing with is a fair and equitable division of costs, Are we going to say to this company, "Now you are going to bear certain portions of these costs yourself and the balance of those costs properly attributable to the gas end of the business you are going to recover from the gas consumers."

THE CHAIRMAN: And if you by your own conduct are precluded recovery, then you suffer a loss.

MR. STEER: Yes, but then if we regard the situation as an integrated undertaking, that consideration does not enter into the picture at all, not does it enter into the picture, in my respectful submission, that Madison segregated from Royalite because my learned friend says we are not to regard it, but how can we help regarding it in the face of the terms of that Order No. 8 of this Board? The Board has to determine, in my respectful submission, what money Madison is entitled to recover from these gas rates, but in determining

that the Board has also to determine what revenue Madison should have received, not what it actually did receive, what it should have received from Royalite as the cost, including any profit, as the cost of rendering that service to Royalite. The Board has decided that question on the basis of the most cogent evidence, in my respectful submission, that it had before it, and how can Madison be heard to come here and say now that no matter what improvident bargain Madison may have made with its parent, which wholly owns it, no matter what improvident bargain they may have made, that the difference between what they get from Royalite and what they ought to have got from Royalite is going to be charged against the consumer of this gas? Suppose they had said free use? They might just as well have said free use as 5%. Suppose they had said it? Could they come in here now and say that the whole of the costs of gathering and compressing gas for the Royalite plant is to be charged against the Calgary consumer? To state the proposition, in my submission, is to refute it.

And I would like to make this point further. I submit that that contract, a very informal one it apparently is, that that contract between Royalite and Madison under which these costs were to be divided was always within the jurisdiction of this Board to control under Section 67(2) of the Act, and that from the very inception of these proceedings Royalite and Madison had notice that the terms of that contract were going to be adjudicated on by the Board, and that that is all that the Board has done. It said "This is the contract which ought to exist and we had a right to determine that division of costs provided for by that contract from the very inception of this Hearing."

THE CHAIRMAN: Mr. McDonald?

MR. McDONALD: I do not think, Sir, I can add anything to the arguments that have been presented. My submission is that there is discrimination if the services rendered by Madison are - or I put it the other way - in my view there is discrimination as between customers if the order is to be made retroactive. I think that this whole problem resolves itself entirely on a question of fact for the Board to determine as to what is or what was the actual rate applicable as between Madison and Royalite, and then when you come to that you come to the question of the $300,000.00. It is a question of what is evidence before the Board.

MR. AUXIER: Mr.Chairman, I do not know that I can add anything to what Mr. Steer has said. You know that my knowledge on that point of this is rather sketchy. I would like only to add this, it seems to me that the incorporation of Madison and the separation of the assets of Royalite cannot have any real bearing on this question. The principle of Solomon and Solomon, to the best of my knowledge, has never been carried far enough to result in imposing on a stranger to a contract the burden of an improvident bargain that may have been made by two people. I do not think there is anything further that I can say on it.

THE CHAIRMAN: Mr. Blanchard?

MR.BLANCHARD: I am entirely in accord with what Mr. Steer said, and for the reasons stated by him. It seems to me the position is not much different than if a structure had been built jointly by Madison and Royalite, some structure which was to serve a joint purpose or a dual purpose, and when rate base came to be considered it was found that the benefit to the

absorption plant was much greater than that represented by Madison as properly chargeable in the rate base to Madison. I think the principle is somewhat the same. Now undoubtedly Madison has had, Royalite has had notice from the commencement of these proceedings that there was to be a division of operating costs with respect to compression and gathering. I cannot understand why, when the evidence was put forward by Royalite that sales realization was the only equitable basis, that at that very time Madison and Royalite did not enter into a new contract on that basis. The evidence indicates that as between departments of Royalite before the incorporation of Madison, a fair division on a sales realization basis would have been 60-40. I have not the evidence before me, Sir, but I think that is the effect of it.

Now it seems to me if that was a fair and equitable basis, Madison cannot complain now, or Royalite rather, if they did not adopt that as the basis at that time, or coming to a later date when the submissions were filed by Madison and Royalite in those submissions and/a new basis was adopted, the volumetric basis for the division of costs, and it was on the volumetric basis that this Board was invited to divide the operating costs, but no change was made in the contract. Surely Madison could not come forward now and say that from the time those submissions were actually made the loss due to charging only 5% should be borne by the consumers. It does not seem to me that the case is analagous at all to discrimination, cases of discrimination between customers receiving the same kind of service. Mr. Chambers has argued that if you are going to make the allocation of costs retroactive on a 60-40 basis, that you must also make the price of gas to Canadian Western retroactive, but if Madison and Royalite had not entered into an improvident bargain, that

loss would not have occurred. It seems to me this contract has been entered into,with full knowledge of the risk it was retained by the company, the Madison or Royalite, and my submission is, as Mr. Steer has stated, that it is not a case of discrimination at all, it is a matter of an improvident bargain or agreement.

MR. CHAMBERS: As I appreciate the argument of my learned friend it is this, the fact that Madison did not make an agreement with Royalite to cover the interim period which during that interim -period it gave to Madison by way of revenue from Royalite an amount equal to the rates that are arrived at by the Board after a two year hearing, it should be held to account, in other words, that Madison should take the loss. That is as I appreciate that argument.

MR. STEER: That is not my argument.

MR. CHAMBERS: That we made an improvident bargain because the bargain did not result in the same rate that the Board now fixes. Now I suggest that presupposes the parties must know and foresee the future, and that in the meantime they operated under a contract where the rates were not as high as the Board decides they should be in the future. You say if Royalite, the customer, will not pay that difference, then Madison should be held to bear the loss because it did not know what the rate was for the future.

THE CHAIRMAN: Mr. Chambers, there are other public utilities in this Province?

MR. CHAMBERS: Yes.

THE CHAIRMAN: Where no hearing has ever been held?

MR. CHAMBERS: Yes.

THE CHAIRMAN: Where no rate has been fixed?

MR.CHAMBERS: Yes.

THE CHAIRMAN: Where no rate of return has been prescribed?

MR.CHAMBERS: Yes.

THE CHAIRMAN: And yet those public utility companies have prepared and have filed with the Board their schedules of rates.

MR. CHAMBERS: Yes.

THE CHAIRMAN: I think there is power in a public utility to do so prior to a hearing.

MR. CHAMBERS: We filed ours in April, 1945.

THE CHAIRMAN: Of rates made before you were a public utility.

MR. CHAMBERS: Yes, and the rates under which we were operating.

THE CHAIRMAN: Then having done that, surely the Board has a right to ascertain if you are complying with Section 52 of the Act? I mean if you have entered into an improvident contract - I won't use the word, an unduly preferential contract, then that contract is unlawful because it is prohibited by statute.

MR.CHAMBERS: I submit, Sir, until the Hearing and the determination of the matter, that the company cannot be held, no company can be held to account retroactively.

THE CHAIRMAN; Would you have the right to say "we will charge you nothing"? Have you right to say that, "we won't charge you at all during those two years?"

MR.CHAMBERS: No, but I say that is not the case.

THE CHAIRMAN: And then who determines the propriety of the rate which you do charge? Remember I am not suggesting for a moment that I can say to Royalite "You will pay the difference." I do not suggest that at all. The suggestion is that I

made a contract which is unduly preferential to your parent company. When I make my computations for the ascertainment of the rate, I use a figure which represents a provident and non-preferential rate.

MR. CHAMBERS: And the provident one is what my friend suggests is that to the extent that we did not collect in the past 40% of the cost that Royalite - in the absence of Royalite now paying it voluntarily, that Madison should be penalized in its rate of return or should absorb the loss.

THE CHAIRMAN: Should the public pay it; Mr.Chambers?

MR. CHAMBERS: I suggest in the first place that nobody could tell. I suggest that even yourself, you did not come to the conclusion until some weeks ago, and I suggest in the second place that no living man or men would know what the costs were.

THE CHAIRMAN: Supposing in 1945 when other interim Orders were being granted for the price of gas, the division of gas revenues, supposing you had come to me then and said "I want an interim Order allocating costs"? The only evidence on which I could have acted at that time was the evidence of your own witness, Mr. Latham, who says "Here is an equitable method".

MR.CHAMBERS: Whose evidence? I suggest in any case, aside from anything else, I suggest was not before the Board because this Hearing that you are now writing your judgment on is another Hearing altogether, and there was no evidence other than the reference that Mr. Fenerty made to what Mr. Latham has said.

THE CHAIRMAN: And what evidence was there when I fixed interim Orders fixing the historical price and then an

arbitrary division between Royalite and B.A.?

MR. CHAMBERS: I submit this was one of the existing contracts, Exhibit 7.

THE CHAIRMAN: The equitable existing contract was that which was in force when Royalite was handling both divisions.

MR CHAMBERS: The 40-60?

THE CHAIRMAN: Yes.

MR.CHAMBERS: I do suggest there is not a tittle of evidence to show that the 40-60 was in force as between the different departments of Royalite.

THE CHAIRMAN: Perhaps not.

MR.CHAMBERS: That is my submission.

THE CHAIRMAN: If my interim Order had been on the basis of sales realization, according to Mr. Kirkpatrick it would work out about 40-60.

MR. CHAMBERS: Aside, Sir, from the question of discrimination, I suggest that during this interim period the rights of all the parties to this Hearing were fixed by this Board by Exhibit 7, which was in existence, by Order No. 9, by Order No, 11 and Order No. 17, and that under those orders and those contracts, that Madison should not be penalized.

THE CHAIRMAN: Mr. Chambers, I want you to help on this one point. The range of what is reasonable between no charge to Royalite and x dollars per annum, without naming a figure, what is the test to be? What is the test of what is between those ranges a just and reasonable figure?

MR. CHAMBERS: Well sir, if somebody would tell me what is the range between the 5% charge and the 40-60 for the interim period, I might be able to give you some assistance on the other one.

THE CHAIRMAN: Then if you cannot help me there, am I not driven to the conclusion that your 5% is purely an arbitrary figure, and not based on any scientific principle?

MR. CHAMBERS: No sir, I do not think so. Here were two parties and they laid it before the Board. They said "We do not know, we consider this is a proper working arrangement in the meantime." They laid it before the Board.

MR. STEER: I would like to ask my learned friend what he would say was the proper decision in case the Order had been given in the first place to Royalite and Madison had not been incorporated? What should the Board have done with regard to gasoline and gas if Madison had not been incorporated at all, and if Orders for construction of facilities had been given to Royalite?

MR. CHAMBERS: I still suggest that even if Royalite had opened a gathering system - now to put into force a 40-60 rate for the first time, it should not be retroactive, in my submission.

MR. STEER: Then your view would be that the Board would be bound by whatever happened to appear in Royalite's books with respect to the charges for the two divisions?

MR. CHAMBERS: And there was a reasonable basis behind it.

MR. STEER: Because that is not my submission of the way the situation should be looked at, Sir.

MR. BLANCHARD: As I understand it the loss over the four year period would have been $52,000.00 in the volumetric method of allocation.....

THE CHAIRMAN: $52,961.00, and no cushion left.

MR. BLANCHARD: No cushion left. Now then, when Madison made those submissions on a volumetric basis, was any

provisions made for the loss due to the difference between the 5% and the volumetric figure? I think there was not, I do not know.

MR. CHAMBERS: I should say this, and probably I will attempt to answer both Counsel at the one time, I say this, that the position at this stage is not the same as though Madison had never been formed, to this extent, Madison's rates are definitely fixed by those interim Orders, and it is by virtue of something that has transpired since the formation and that that has a very important bearing on this situation.

THE CHAIRMAN: Well have you all had your say? I am not going to give any decision now, naturally, but I want to see all Counsel in my room immediately after we adjourn on an entirely different subject, not what we are discussing now.

(The Hearing was then adjourned).

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